

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0580
Gross Retail & Use Taxes
Penalty
For Years 1996, 1997 & 1998

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail and Use Taxes—Miscellaneous

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-3-7; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4

Taxpayer protests the assessment of gross retail and use taxes on purchases where no invoices or exemption certificates were produced during the audit.

II. Penalty—Request for Waiver

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of the 10% negligence penalty.

STATEMENT OF FACTS

Taxpayer, a corporation formed in 1995 when four different corporations merged, is in the business of retailing two-way radio equipment, setting up, installing, and servicing communications equipment. Taxpayer had cellular and paging sales operations in Illinois, as well as other sales operations in Indiana and Missouri. The cellular and paging operations were sold in 1997. Taxpayer in 1997 also sold towers, which had "repeaters" on them. During the audit, taxpayer was given ample opportunity to provide documentation to support its claim that no gross retail or use taxes were owed to the Department of Revenue. However, taxpayer had kept incomplete records from the time of the merger until the audit, and was unable to locate invoices and exemption certificates. The Department issued its proposed assessment of use tax liability for the years at issue, and taxpayer protested. Protest review on numerous occasions over a lengthy period of time attempted to obtain information from taxpayer. The Hearing Officer assigned to the protest also gave taxpayer ample opportunity to provide documents supporting its protest of the proposed assessment of Indiana gross retail and use taxes. Taxpayer

did not provide such documentation and has had no further contact with any Department representative since filing its protest in November of 1999. Taxpayer has not responded to the Department's repeated requests for documents, and for taxpayer's appearance at a hearing on the protest. Additional facts will be added as necessary.

I. Gross Retail and Use Tax—Purchases

DISCUSSION

Taxpayer protests the gross retail and use tax assessment on purchases for its business. As discussed in the Statement of Facts *supra*, taxpayer has had ample opportunity to provide the necessary documentation supporting the protest of the proposed assessment of Indiana gross retail and use taxes. Taxpayer has also had ample opportunity to schedule a hearing on its protest. Taxpayer has neither provided the Department with documents, nor contacted the Hearing Officer to schedule a hearing on the protest.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a “notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made.” Pursuant to IC § 6-2.5-2-1, a “person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.” *See also*, 45 IAC 2.2-2-1. Pursuant to IC §§ 6-2.5-3-1 through 6-2.5-3-7, an “excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction.” An exemption is provide in IC § 6-2.5-3-4 if “the property was acquired in a retail transaction and the state gross retail tax” was paid at the time of purchase. Taxpayers are personally liable for the tax. (IC § 6-2.5-3-6). IC § 6-2.5-3-7 provides that a “person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;” therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4. In this case, taxpayer has not rebutted the presumption that it owes the state of Indiana the assessed gross retail and use taxes.

FINDING

Taxpayer’s protest concerning the assessment of gross retail and use taxes on purchases where invoices and exemption certificates were not produced during the audit is denied.

II. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the assessment.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax

shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the 10% negligence penalty on the entire assessment is inappropriate in this particular instance.

FINDING

Taxpayer's protest concerning the proposed assessment of the 10% negligence penalty is denied.